BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: KIMES MORRIS CONSTRUCTION INC. 22400 Foothill Boulevard Hayward, California 94541-0025 Employer	Docket No. 02-R1D4-1273[1] **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Kimes Morris Construction Inc. (Employer or "KMC") under submission, makes the following decision after reconsideration.

Background and Jurisdictional Information

Beginning January 9, 2002, Garrett D. Brown, Associate Industrial Hygienist for the Division of Occupational Safety and Health (Division), conducted an inspection at 22400 Foothill Boulevard, Hayward, California, where Employer maintained a place of employment, based on a referral from another governmental agency. On March 7 and 25, 2002, the Division cited Employer alleging numerous violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations. The alleged violations were the substance of 7 citations issued to Employer[2], all of which Employer timely appealed, and all of which were in due course set for hearing before an Administrative Law Judge (ALJ) of the Board. At the outset of a hearing held on October 7 through 9, 2003, the parties resolved the appeals of the first six citations. Employer withdrew its appeals from the six citations, leaving Citation 7 to be resolved.

[1] The Order taking petition under submission erroneously listed all seven docket numbers. The correct docket number for this Decision After Reconsideration is 02-R1D4-1273 only.

[2] There appears to be a typographical error in the issuance date of Citation No. 7. It shows 3/25/01 but likely should be 3/25/02.

During the hearing the Division's motion to amend Citation 7 to change the proposed penalty from $12,000 to $10,000 to correct a mistaken calculation was granted. The ALJ issued a Decision upholding Citation 7 on December 23, 2003. Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the petition on February 26, 2004.

Docket No. 02-R1D4-1273

Citation 7, Willful/General, sections 1529(k)(2) & (k)(3)

[Not determining presence, location & quantity of asbestos and informing employees before asbestos work commenced]

As will be seen, we reverse the ALJ as to the section 1529(k)(2) violation because KMC was not the owner of the building, and we affirm as to the section 1529(k)(3) violation because KMC was the employer working on the building.

Employer's Petition for Reconsideration contends:

1. The evidence in this matter does not support a finding that Employer was the owner of 22400 Foothill Boulevard, Hayward, California.
2. The Administrative Law Judge erred in concluding that a finding that an employer had "….sufficient information to trigger a duty…" to test for asbestos, without a finding that the employer had actual knowledge of the duty, can support classifying a violation of the legal obligation to test as willful.
3. The Administrative Law Judge erred in concluding that an Employer's knowledge of a "potential" hazard can, without a finding that the Employer appreciated the hazard, support a willful classification.
4. The Administrative Law Judge (ALJ) erred in concluding that the Appeals Board has created separate and different standards for finding that an Employer has committed a willful violation of a regulation and for finding that an Employee has willfully violated a safety order.
5. If the Appeals Board applies different standards when analyzing the conduct of Employers and Employees as related to willful misconduct was correct, the Board is acting in violation of the equal protection provisions of the United States and California Constitutions.

FACTS OF CASE

After a Bay Area Air Quality Management District (BAAQMD) Specialist discovered that a building Employer was remodeling (which included partial demolition work) contained asbestos, and that the work, which included debris disposal, was being carried out without any precautions against employee exposure to the material, BAAQMD referred the matter to the Division. The Division subsequently issued citations to Employer, which were timely appealed.

At the hearing, the parties stipulated that the asbestos testing methodology used by Forensic Analytical, and its resultant findings, were correct. Three of six samples were found to contain 7-10% chrysotile asbestos.[3]

There is no factual dispute over what occurred. The interior of the relevant building was being partially demolished for remodeling. KMC employees used hand tools such as power saws, hammers, and shovels to remove existing walls, ceilings, and stairs, and take the resulting debris to a dumpster in the alley. The dumpster was not designed or intended to handle hazardous waste. Moreover, while the work generated considerable dust, the workers used no form of respiratory protection (except dust masks not designed for asbestos protection) nor were the areas sealed off to contain the dust or other measures taken to separate the workers from any airborne contaminants.

Employer concedes the violation's existence. The two remaining issues are whether Employer was a "building owner" whose duty it would be to inform its employees and other employers, if any, working on the project of the asbestos under section 1529(k)(2), and whether the violations of sections 1529(k)(2) and 1529(k)(3) were properly classified as "willful." The latter debate involves whether the evidence supports a finding that Employer's state of mind – in not identifying the presence, location, and quantities of asbestos and informing employees (and others) about the findings – amounts to "willfulness" as defined by the pertinent regulations, statutes and applicable precedent.

KMC is a Subchapter S corporation which was formed by Andrew (Andy) Kimes (Kimes) and James R. (Jim) Morris (Morris), the principal shareholders, in 1995, with Kimes as President and Morris as Chief Financial Officer and Secretary.[4] The vast majority of KMC's work involves constructing new

[3] Title 8, California Code of Regulations, section 1529 applies to material containing more than 1% asbestos.

[4] Kimes is identified as its "CEO" in Exhibit 35, a Contractors State Licensing Board form on which corporate officers are reported. The last document in the Exhibit, a license renewal application from KMC, states Kimes' title as "Responsible Managing Officer/Executive Officer," and Morris' title as "Secretary/Treasurer."

commercial and residential buildings, not remodeling or demolition. Since its formation, KMC has performed only 3 projects involving any remodeling or demolition – installing siding on a residence, work preceding construction on a structure called "the Artech Building," and the site in question.

Morris was required to pass an open book examination about asbestos in order to obtain a contractor's license from the California Contractors State License Board (Licensing Board). The Licensing Board was required by Business and Professions Code section 7085.5 to deliver to contractors and license applicants (and license renewal applicants) a booklet with information about asbestos. Based on the licensing file for "K and M Builders" and testimony from the Licensing Board agent (Susan Perales) familiar with the procedures and in charge of its records, the booklet contained the answer sheet Morris submitted for his license in 1987. We find, therefore, that Morris had at least basic knowledge about asbestos and its hazards in construction work, including the requirement that buildings constructed before 1978 be surveyed or tested for the presence of asbestos-containing materials.[5]

Kimes and Morris fulfilled complementary roles in KMC. Kimes handled the actual construction work "in the field," that is he actively managed the physical work on projects; and Morris managed the office tasks such as administration, contract negotiations, developing plans and specifications, estimating and so on.

DECISION AND ANALYSIS

The ALJ's finding that KMC violated section 1529(K)(2) is reversed.

Employer's contention that section 1529(k)(2) does not apply to KMC because it is not a "building/facility owner" is upheld. For the reasons stated below we reverse the ALJ's decision and sustain Employer's appeal as to that citation.

The facts show that an investor named Fishman was a 50% owner of the Foothill Building. Fishman approached Kimes and Morris, whom he had known for a long time, and asked if they were interested in purchasing the other 50% interest, which was held by two other investors. Morris knew Fishman to be a very successful investor and was persuaded to buy the half interest in the building. Morris thought it was a good deal and only drove by the building before agreeing to buy. Kimes and Morris apparently formed Coastal View Associates (CVA), a limited liability company, to hold the 50%

[5] It was undisputed the Foothill Building had been built before 1978.

interest. On September 17, 2001, CVA bought their 50% ownership interest in the building, with no involvement by any bank or realtor. The deed was signed in October 2001. KMC did not acquire any interest in the property.

Based on these facts we agree with Employer's contention that Coastal View Associates and Richard Fishman are the legal entities that own the Foothill Building and that KMC is not an owner.

In finding that KMC was liable, the ALJ stated that section 1529(b) gives the following definition:

> "Building/facility owner" is the legal entity, including a lessee, which exercises control over management and record keeping functions relating to a building and/or facility in which activities covered by this standard take place. [Emphasis added.]

The ALJ held that for purposes of section 1529(k)(2), KMC is the "building or facility owner" because it exercised the control described above. The ALJ determined that KMC's principals were co-owners of the building as shareholders in CVA. They responded to inquiries about the building, controlled activities in the building, and Morris represented himself as part owner of the building when dealing with investigating agents. The ALJ further held that the record shows that, during the demolition, KMC was the only entity that exercised control over all the activities occurring in the building. The ALJ held that overall the record suggests that although KMC's name may not be on the building's title, and that it may not be the owner of the facility for some purposes, KMC exercised the type of control that renders it a "building owner" for purposes of section 1529.

We agree that section 1529 requires building owners and employers to take certain actions before "work subject to this standard" is begun, including the types of work done in this case. However, we disagree with the conclusion that because Kimes and Morris are "owners" of CVA and owners of KMC then KMC is the building owner. To so conclude would be to overlook several important legal concepts. For instance, Labor Code section 18 defines "person" as "any person, association, organization, partnership, business trust, limited liability company or corporation". Also, a corporation is a legal person or entity recognized as having an existence separate from that of its shareholders. (See generally 9 Witkin, Summary of Cal. Law, (9th ed. 1989) § 1, pg. 511 [Corporations] *Erkenbrecher* v. *Grant*, (1921) 187 Cal. 7, 9.) Shareholders are not the owners of corporate property, and the corporation and a shareholder are distinct parties in contracts made by one or the other. (*Baker Divide Mining Co.* v. *Maxfield*, (1948) 83 Cal.App.2d. 241, 248); (*Union Bank* v. *Anderson*, (1991) 232 Cal.App.3d 941, 949.) As noted in *Acco Contractors, Inc.* v. *McNamara & Peepe Lumber Co.*, (1976) 63 Cal.App.3d 292, 296, "many small

corporations are formed to limit the liability of individual owners and to take advantage of tax provisions." [6]

The record shows that Morris and Kimes were shareholders in CVA and KMC, both of which are corporations. KMC was clearly the employer and CVA was not. Similarly, CVA was the building owner and KMC was not. Further, Morris and Kimes are individuals holding ownership interests represented by stock. They are separate and distinct from KMC the employer. The decision below fails to acknowledge the multiple and distinct roles fulfilled by the entities involved.

Moreover, we find that KMC did not exercise control over management and record keeping functions in the manner of an owner or lessee; rather it was acting as a contractor doing the demolition and reconstruction incident to the remodeling of the building. KMC was no different than any other construction contractor working on a building. Similarly, Morris may have legitimately held himself out as part owner of the building and answered questions about it, but, as explained, Morris is not KMC.

From the evidence presented we find that KMC was erroneously cited under section 1529(k)(2) as a building owner. "Prosecuting the proper entity is an element of a violation that comes within the Division's burden of proof." (*C.C. Myers, Inc.* Cal/OSHA App. 00-008, Decision After Reconsideration (Apr. 13, 2001). Since KMC was incorrectly cited as a building owner, we reverse the ALJ and grant Employer's Petition for Reconsideration on that issue.

The ALJ's finding that Employer committed a willful violation of section 1529(k)(3) is affirmed.

As noted above, Employer makes four arguments against the holding that it committed a willful violation of section 1529(k)(3). We address the first two in concert, as they are closely related:

> The Administrative Law Judge erred in concluding that a finding that an employer had '….sufficient information to trigger a duty…' to test for asbestos, without a finding that the employer had actual knowledge of the duty, can support classifying a violation of the legal obligation to test as willful as willful.
>
> The Administrative Law Judge erred in concluding that an Employer's knowledge of a 'potential' hazard can, without a finding

[6] The grounds for "piercing the corporate veil" under California law do not exist in this case. *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538-539

that the Employer appreciated the hazard, support a willful classification.

We begin our discussion by stating that KMC was an employer engaged in "work subject to" section 1529 by undertaking demolition, removal, and disposal of structures (e.g., ceilings, walls) where asbestos was present.

Here, the primary issue is whether the circumstances of the violation merit the "willful" classification.

Board precedents and the Court of Appeal's decision in *Rick's Electric, Inc.* v. *California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, allow the Division two alternate means of proving the willfulness of an employer's conduct under section 334(e).[7] The Division may prove either that the employer knew the provisions of the cited safety order and intentionally violated them, or prove the employer was aware "that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition." Id. at 1034; section 334(e); See, *Witeg Scientific*, Cal/OSHA App. 97-3115, Decision After Reconsideration (May 21, 2002); *Brutoco Engineering & Construction, Inc.*, Cal/OSHA App. 96-1342, Decision After Reconsideration (Aug. 20, 2001); *Tutor-Saliba-Perini*, Cal/OSHA App. 94-2279 (Aug. 20, 2001); *Owens-Brockway Plastic Containers*, Cal/OSHA App. 93-1629, Decision After Reconsideration (Sept. 25, 1997); and *Rick's Electric, Inc.*, Cal/OSHA App. 95-136, Decision After Reconsideration (Sept. 24, 1997).

We examine the evidence with regard to both tests, in sequence.

As to the first test, our review of the record shows that the Division failed to demonstrate that Employer received or read the provisions in section 1529 or other "asbestos regulations." There is no evidence that the Licensing Board's mention of AB 2040 and SB 2572 in the materials Morris reviewed in 1987 have anything to do with section 1529. Accordingly, it cannot be concluded that Employer knew about the requirements of section 1529(k).

We further find the facts do not support a conclusion that Kimes or Morris knew that the building's interior contained asbestos. The ALJ found that Kimes exposed himself daily to the work process and that, had he suspected the generated dust contained asbestos, he likely would not have exposed himself to the danger. Further, there was no evidence showing any attempt by Employer to "hide" anything from regulatory agencies such as BAAQMD or the Division.

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[7] The Division has the burden of proving each element of its case by a preponderance of the evidence. (*Cambro Manufacturing Co.,* Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986), p. 4.)

KMC's owners never saw the contents of a "Phase 1" environmental report (obtained by Mr. Fishman, the other owner of the building) or knew of its contents. Further, the Division did not establish by inference, from statements attributed to Kimes in response to questions by investigators, that Employer knew or thought there existed asbestos prior to commencement of the demolition work. For example, the ALJ found unpersuasive the testimony of two Division witnesses' who attempted to establish that Employer knew about the presence of asbestos and that Kimes and Morris stayed away from the dust-generating operation to avoid risk to themselves. Three employee witnesses who worked for KMC refuted a witness for the Division. An ALJ's findings based on witness credibility are entitled to great weight because the ALJ was present during the hearing, and had the opportunity to directly observe and gauge the demeanor of the witnesses and weigh their testimony in light of their manner on the witness stand. (See, *Garza* v. *Workmen's Comp. Appeals Board* (1970) 3 Cal.3d 312, 318-319; *Metro-Young Construction Company*, Cal/OSHA App. 80-315, Decision After Reconsideration (Apr. 23, 1981).)

The second test of willfulness articulated in *Rick's Electric, supra*, has two elements, namely awareness of a hazardous condition and failure to make reasonable efforts to remove the condition. It was not disputed that Employer made no efforts to remove the condition. Thus whether the violation in question was willful turns on whether Employer was "aware of [the] hazardous condition."

We find that there are sufficient credible facts established by Morris' testimony and conduct to show he was or should have been aware of the requirements relating to the hazards of asbestos and the need to determine if it is present in older buildings before commencing work on them.[8] Based on the evidence and testimony presented, the ALJ concluded that Morris had sufficient information to alert him to the existence or give him reason to suspect the existence of asbestos in the building. Morris had received information from the Licensing Board sufficient for him to know, at least when he received his license, that, before beginning work on a project, the contractor must inquire of the owner whether asbestos is present in a pre-1978 building. This knowledge was reinforced and/or refreshed by Morris' experience on the Artech Building project, which is briefly summarized below.

The record shows that in the spring of 2001, (one year before the citations here were issued) KMC contracted to build a structure called the

[8] The connotation imparted by the word "aware" is that there is some realization, perception, or knowledge. *Aware* may indicate either general information, wide knowledge, interpretive power, or vigilant perception. Webster's Third New Int'l Dictionary, p 152.

"Artech Building." The project involved removing an existing structure and building a new one in its place. Morris testified that he became aware, while negotiating a subcontract to demolish the old building, that the demolition subcontractor required an asbestos survey be done.[9] The subcontractor told him that if the survey disclosed the presence of asbestos, another firm would have to remove it. Morris contacted his client to inform it of the requirement, and his client told him there was already an asbestos survey done on the building. The client sent a copy, and KMC received a "pre-demolition asbestos and lead survey report" as well as testing results on the property.

Morris and one of KMC's project managers arranged a subcontract by which an asbestos abatement contractor would perform the asbestos removal on the Artech Building. Morris signed off on that subcontract. The asbestos removal, disposal, and final clearance monitoring were completed by early June 2001. Morris remembered walking by the structure to be demolished when the asbestos subcontractor had plastic containment up and "you couldn't go in there," After that work was done, the building was demolished by another subcontractor.

Therefore, we find that Employer was aware of the requirements contained in Labor Code section 6501.9, whether or not he was specifically aware that they were stated in the Labor Code or in the Safety Order (i.e. section 1529). Morris admitted that before this project, he knew asbestos was "nasty stuff" and that it was sometimes used to construct buildings built before the 1980's. He knew that "in old buildings there could be asbestos in them; everybody knew that [or] a lot of people knew that . . . a lot of contractors, yeah." We agree that the potential presence of asbestos in older buildings was common knowledge among contractors. As stated in *McCormick Construction Co.*, Cal/OSHA App. 84-118, Decision After Reconsideration (June 20, 1985): "[P]ersons engaged in the business of renovating old buildings can no longer be heard to say they did not know there was asbestos in the structure. Prior to 1970, asbestos had been widely used as a building material. So much mass media publicity has been given to this fact by diverse governmental agencies throughout the country, including the State of California, that those engaged in building renovation should presume that asbestos has been incorporated into the structure until they have convincing evidence to the contrary…" What was true in 1985 was no less so in 2001 and 2002.

In light of the Licensing Board process Morris went through, his involvement with asbestos testing and removal in the Artech Building project, and his testimony that "a lot of people knew" there could be asbestos in old

[9] Labor Code section 6501.9, enacted in 1986 states that a contractor shall inquire of the owner if asbestos is present in any building or structure built prior to 1978.

buildings, we further find that Morris possessed sufficient information to be aware that the Foothill building *could* contain asbestos in the area KMC was to demolish and that someone needed to test it for asbestos before demolition by KMC employees began. Morris nonetheless took no action to assure that asbestos did not exist in the building. Failure to act under the circumstances here supports a willful violation. It was unnecessary to show that Morris knew asbestos was actually present.

We concur, therefore, with the findings of the ALJ that the overall record shows that Morris was aware of Employer's duty at least "to determine the presence, location, and quantity" of asbestos in the materials about to be demolished.[10] Morris' only reason for not doing so was that it was not his project – it was Kimes'. In fact, the project was KMC's. As a principle of KMC, Morris' knowledge and his failure to act on that knowledge is imputable to KMC. An employer's duty to provide its employees a safe and healthy work place is non-delegable. (See, e.g., *Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).)

Thus the circumstances in this case and in *Rick's Electric, supra,* are similar. Both employers were aware of a hazardous condition based on prior experience with the specific hazard, and each employer failed to act to protect its employees from the hazard.

We also point out that our decision to affirm the willful classification under the second alternative of the *Rick's Electric, supra*, test is limited to this specific set of circumstances. Important factors to our decision here include the ALJ's credibility determinations, Employer's years of experience in construction, the common knowledge in the construction business (at least as of 1985 and after) that older buildings have to be tested for asbestos before demolition and/or remodeling, and Morris' own recent experience with asbestos during the Artech project. Given the above and the other evidence in the record we find that Employer had the degree of awareness necessary to uphold the willful classification of the violation.

Employer next argues the ALJ erred in concluding that there are different standards applicable to determining whether an employer has committed a willful violation and whether an employee has willfully violated a safety order.

[10] For example, Morris had 15 years' experience in construction and had engaged in the Artech project, a renovation involving asbestos removal, a year prior to the Foothill building project. See *Dept. of Transportation, State of California*, Cal/OSHA App. 81-0017, Decision After Reconsideration (Nov. 24, 1981); *Kaiser Foundation Hospitals*, Cal/OSHA App. 81-665, Decision After Reconsideration (July 25, 1985).

Employer's argument conflates two separate tests and the determinations made in applying them.

The test regarding an *employee's* conduct is applied in the context of the affirmative defense to an alleged violation the Board has labeled the "independent employee action defense," or "IEAD." That defense was articulated by the Board in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1890). It consists of five elements, the fifth of which is that the employee involved caused a safety infraction which he or she knew was contrary to the employer's safety requirements. "Willful" behavior in that context (what an employee knows concerning the employer's safety requirements) is distinct from what an *employer* knew about the hazards involved in a workplace and its legal responsibilities concerning those hazards. Hence, while there are two different standards, only one is applicable in this matter, and the correct one has been applied here.

Employer's final argument is that if the Appeals Board's use of different standards when analyzing the conduct of employers and employees as related to willful misconduct was correct, the Board is acting in violation of the equal protection provisions of the United States and California Constitutions.

The principle underlying equal protection is that persons situated alike should be treated alike. Thus a statute may not be enforced differently against similarly situated persons. As demonstrated above, in the contexts of *employee* behavior as regards the IEAD and *employer* behavior as regards analysis of willful violation allegations, the situations and persons *are not* similarly situated. Moreover, even if they were similar, to prevail on an equal protection claim an employer must also show that the Board has acted intentionally.

In *Bendix Forest Products Corp.,* Cal/OSHA App. 79-1532, Decision After Reconsideration (Mar. 5, 1981) the Board stated:

> The law is clear that 'the enforcement of a statute resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination.' A discriminatory intent is not presumed. Rather, the good faith of those enforcing the law and the validity of their action are presumed. The burden of proving discrimination is on the complaining party. [Citations omitted.]

Here Employer contends that by being cited it was subjected to a scheme that creates a moving target to satisfy the regulation's requirements. Employer

has offered no proof of selective enforcement during the administrative hearing. Employer thus did not prove even that it was treated differently from other employers, much less that the ALJ acted with discriminatory intent.

Employer's argument that it has been denied equal protection of the laws or has been denied equal treatment under the law is an affirmative defense. The burden of proof is on Employer to establish that it has been singled out for inspection by the Division on the basis of some deliberate (i.e., purposeful or intentional) discriminatory enforcement based upon an unjustifiable (i.e. invidious) standard. This is the thrust of *Murgia* v. *Municipal Court*, (1975) 15 C.3d 286, and the authorities reviewed in *Murgia* (see also *Novo-Rados Enterprises, a joint venture*, Cal/OSHA App. 76-305, Decision After Reconsideration (Feb. 23, 1983)).

Upon our review of the entire record we find that the record is devoid of evidence supporting Employer's assertion that there has been selective enforcement against it of the cited safety orders.

DECISION

Our full review of the evidence and record of proceedings presented to the Administrative Law Judge supports his factual findings and conclusion of law as relating Employer's willful violation of section 1529(k)(3).

We reverse the ALJ's findings that KMC is a "Building Owner", by virtue of its control of the project, and thus the ALJ's ruling that KMC violated section 1529(k)(2).

We affirm the ALJ regarding the determination that KMC committed a willful violation of section 1529 (k)(3). The $10,000 penalty is also affirmed.

The decision is affirmed and reversed as stated.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 8, 2008